UMW ACCEPTANCE & CREDIT SDN. BHD.

v.

LAHAD DATU TIMBER SDN. BHD. & ORS.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CIVIL SUIT NO. K. 716 OF 1985]
16 DECEMBER 1991

CONTRACT: *Garnishment order - Interest due and accruing - No express interest clause - Uncertainty - Privity of contract*

CIVIL PROCEDURE: *Execution - Garnishment order - Whether interest due and accruing - Whether obligation to pay.*

The 1st garnishee was indebted to the 1st defendant for the principal sum of RM834,174.63 which by an agreement dated 27 April 1988 involving the 1st and 2nd garnishees and the 1st defendant, the 2nd garnishee agreed to settle by way of loan stock or shares in the 2nd garnishee issued at par value of RM1 each to the amount of the sum owing.

In addition to the settlement of the principal sum of RM834,174.63 by way of shares issue, there was "a balance of amounts owing due to the further accumulation of interest up to the date of full settlement of the debts" from the 1st and/or 2nd garnishee "to be satisfied by cash".

Plaintiffs accepted that the 2nd garnishee had issued 834,175 shares of RM1 each in full settlement of the principal debt.

The garnishees denied that interest was payable after the issue of the said shares or at all.

On 13 December 1988 the 2nd garnishee issued a circular to shareholders which the solicitors for the 2nd garnishee contended was a prospectus.

This was an appeal by Tongkah Plantations (1st garnishee) against the decision by the Senior Assistant Registrar made on the 7 June 1990 granting an order that the Supplementary Order to show cause dated 19 May 1990 be made absolute against the interest on RM834,174.65 with effect from 31 October 1988 and a further order that the quantum of interest be assessed.

The appellants contended that there was no interest agreed between the parties and even if there was such an agreement it was void for uncertainty and even if the said agreement was not void for uncertainty from 1st judgment debtor (1st defendant) was not privy to it and so cannot enforce it. In the event it is ruled that interest was payable then such interest is only payable from 1 November 1988 to 28 April 1989.

Held:

[1] The Court is of the view that the question as to whether the circular constituted a prospectus was not significant in determining the matter regarding interest.

[2] The Court took the view that the Senior Assistant Registrar's ruling on the interest due based entirely on one passage in the circular was not prudent.

[3] The word "further" in the sentence - "The balance of the amounts owing due to the further accumulation of interests up to the date of full settlement of the debts will be satisfied by cash" evidently referred to interest awarded by the Court upon judgment having been entered. As regards to the 1st defendant there was no judgment in issue.

[4] The Court agrees with the appellant's contention that the tripartite agreement between the appellant, 1st garnishee and 1st defendant on 27 April 1988 showed no agreement or provision for interest payment as there was no evidence to the contrary.

[5] The 1st defendant cannot be privy to the abovesaid agreement by mere mention in a later document which did not even constitute part of the agreement. Therefore any reference to the 1st defendant in the circular cannot and should not be construed as part of the earlier agreement.

[Appeal allowed with costs.]

Case referred to:
Dorman, Long & Company Ltd [1934] 1 Ch 635 ***(cons)***

Legislation referred to:
Companies Act 1965, ss. 4, 39, 39A, 43, 46, 47

Other source referred to:
The Principle of Modern Company Law, Gower 1989, pp. 295-296

For the plaintiff/respondent - Philip Lee; M/s. Lee & Aziz
For the 1st and 2nd garnishees/appellants - Colin Lau; M/s. Colin Lau & Co.

JUDGMENT

Syed Ahmad Idid JC:

The Senior Assistant Registrar on 7 June 1990 granted an order that the supplementary order to show cause dated 19 May 1990 be made absolute against the interest on RM834,174.65 with effect from 31 October 1988 and a further order that the quantum of interest be assessed.

This is an appeal by Tongkah Plantations (lst garnishee) against that decision. The grounds advanced in the appeal are that:

(1) There was no interest agreed between the parties;

(2) Even if there was an agreement on the interest, it was void for uncertainty;

(3) Even if the interest agreement was not void for uncertainty, the 1st judgment debtor (1st defendant) was not privy to it and so cannot enforce it and in case it is ruled that interest was payable then interest is only payable from 1 November 1988 to 28 April 1989.

The tripartite agreement among the appellant 1st garnishee and 1st defendant was dated 27 April 1988. Nowhere in this agreement was there any mention of interest chargeable. Learned Counsel for plaintiffs conceded on this point. In order to understand the situation, the following should illustrate the difficulties:

(1) The 1st garnishee was indebted to the 1st defendants for the principal sum of RM834,174.63 which by an agreement dated 27 April, 1988 involving the 1st and 2nd garnishees and the 1st defendants, the 2nd garnishee agreed to settle it by way of loan stock or shares in the 2nd garnishee issued at par value of RM1 each to the amount of the sum owing. (See 'YKC1' in affidavit of Yeok Kheng Chew of 26 April 1989)

(2) In addition to the settlement of the principal sum of RM834,174.63 by the issue of shares in the 2nd garnishee, there was "a balance of amounts owing due to the further accumulation of interests up to the date of full settlement of the debts" from the 1st and/or 2nd garnishee "to be satisfied by cash" to the 1st defendants. (See 'YKC2' at p. 3 under sub-heading 4 thereof).

(3) The plaintiffs accepted that the 2nd garnishee had issued 834,175 shares of RM1 each to settle the debt in respect of the principal sum of RM834,174.63.

(4) In para. 10 of the affidavit of Tan Yeow Khoon affirmed on 5 May 1990 (in response to para. 15 of the affidavit of Keong Choon Keat for the plaintiff) the garnishees denied that interest was payable after the issue of the said shares or at all.

On 12 December 1988, Tongkah Holdings Berhad (THB) (garnishee 2) issued a "circular to shareholders". This was addressed to "the shareholders of THB." Mr. Philip Lee, in quoting ss. 39, 39A, 43, 46, 47, Companies Act 1965, argued that the circular was a "prospectus" and was in compliance with the Companies Act. The submissions and arguments were not comprehensive. Though both learned Counsel had completed their submissions, the Court was not satisfied. Some issues remained unsettled.

So on 14 September 1991 Mr. Patrick Yong, the Assistant Registrar, wrote to both Counsel to ask them for further submissions as follows:

(1) Is the circular to shareholders a prospectus? and provide decided cases on the proposition.

(2) Paragraph 4 (p. 3) "the balance of the amounts owing due to the **further** accumulation of interest up to the date of full settlement of the debts will be satisfied by cash." what does **"further"** refer to? what impact/implication (s) are there (if you consider relevant) on:

(a) Paragraph 3(ii) (p. 17) in respect of 7,719,444 shares? See also para. 3 (p. 27 and 28) and Ordinary Resolution 3 (p. 29 and 30);

(b) Paragraph 15 (p. 21) Term Loans - is this related to (p. 17) para. (i) in respect of proceeds of proposed rights issue?

(c) Paragraph 17 (p. 21) other creditors. Does this para. - which states "balances outstanding together with interest - refer also to companies not mentioned therein?"

(d) Other paragraphs and pages of the circular which can guide the Court on its decision; and

(e) Any other issue relevant to the action.

The learned Counsel then filed in their further submissions (i) by Mr. Colin Lau on 30 September 1991; (ii) by Mr. Philip Lee on 11 October 1991; and (iii) reply by Mr. Colin Lau on 22 October 1991.

From the further points raised, challenged and demolished/withstood the arguments, it became clear that:

(a) whether or not the circular was a prospectus was not really an issue which can determine the matter regarding interest. Mr. Philip Lee submitted that the circular was a prospectus and quoted s. 4 of the Companies Act 1965 and Gower 1989 "*The Principles of Modern Company Law*" at pp. 295-296. The circular was addressed to the shareholders of Tongkah and its purpose was "...to explain the above proposals to you (the shareholders) more fully and to seek your approval to the Ordinary Resolutions at the EGM of the Company to be held....." See: Re - *Dorman, Long & Co. Ltd.* [1934] 1 Ch 635

(b) The Senior Assistant Registrar's ruling that interest was due on the RM834,174.63 was hinged very much on one passage in the circular "The balance of the amounts owing due to the further accumulation of interests up to the date of full settlement of the debts

will be satisfied by cash." (See p. 3 of the circular, under clause. 4). The debts conversion had been approved by the CIC and FIC between August and October 1988. It is usually not wise to pick out one sentence and make a decision on it. There were other sentences which tell an opposite tale;

(c) The word **"further"** in that sentence must of necessity refer to the interest after the-cut-off date at 31 October 1988 and this can only mean the interest of 8% per annum awarded by the Court upon judgments having been entered. (See p. 21 of circular "Notes to the Accounts" para. 21, where it is clearly stated that "All these companies (Bena (Holdings) Sdn. Bhd., Bena Wood Sdn. Bhd. and Bena Corporation Sdn. Bhd.) obtained default judgments against the company (i.e. Tongkah/garnishees) and its subsidiary company in 1986, which required the company and its subsidiary company to settle the balances outstanding together with interest of 8% per annum effective from the date of judgment." See p. 27 (of the circular para. 3(a), and p. 28 at para. 3(b), (c) and (d)). I agree with Mr. Colin Lau's contention that as regards the debt owing to Lahad Datu Timber Sdn. Bhd., there was no judgment in issue. Paragraph 3 of Appendix IV at p. 27 of the circular illuminates the position. Mr. Lee valiantly submitted that as the word **further** also appears in respect of Sri Cendana, (para. 2 on p. 2 of the circular any reliance on the Court judgments appears to be a fallacy). He has, sadly, neglected to see the explanation in respect of "default in the servicing of interests" and that Sri Cendana made payment of RM7 million as part settlement of the interests outstanding. So on that I have to reject and rule that the word **further** is applicable to show interest payable on the judgment sums.

(d) Tan Yeow Khoon in his affidavit dated 5 May 1990 lucidly explained that:

> ... the first and second garnishee and the first judgment debtor made no agreement nor provision for the payment of interest...

He was the director of both Tongkah Plantations (M) Sdn. Bhd. and 2nd garnishee. I could not disbelieve him as there was no adverse evidence.

Considering the above facts including the relevant parts of the circular and other evidence. I find that no agreement on the interest payable was made or reached by the parties in respect of 1st defendant. All that the parties agreed to was that the unsecured debts totalling RM834,175 owing to Lahad Datu (1st defendant) or their assignees be converted into equity capital of new ordinary shares and such shares were to be issued at par and credited as fully paid in settlement of the debts as at 31 October 1988. Any reference to Lahad Datu in the circular cannot be taken as part of nor imputed or imported into the earlier agreement. One cannot be privy to the agreement by the mention of one's name in a later document which does not even form part of the agreement.

The confusion arose because the word "interest" was used in the circular and there was no specific reference or limitations. But the above discussion has dispelled such notion that interest was payable on the RM834,175. As such the senior Assistant Registrar's ruling is now set aside and I allow the appeal with costs. Ordered accordingly.

Also found at [1992] 2 CLJ 1085